

[3] Clough does not accept that it is contractually bound to pay the balance of the bonus for the 2007/2008 year. It says that when Mr Anderson raised the issue that he was incorrectly paid his bonus for that period it made a further payment to him of \$3542 gross and Mr Anderson agreed to the basis that the payment was made on. It says that Mr Anderson has waived his right to continue his claim. Clough says that even if it was found that there was a contractual entitlement to a bonus and there is money owing, the Authority is not able to fix new terms and conditions of employment and award Mr Anderson an additional sum for payment for this bonus.

[4] In relation to the 2009/2010 year, Clough says that it is not contractually bound to make a pro rata payment because the bonus was a discretionary payment and it is company policy to only pay a bonus to people who are employed as at 30 June each year. It says that there is no contractual entitlement to a pro rated bonus and the Authority would be fixing new terms and conditions of employment if it awarded Mr Anderson the bonus he claims for that year.

The issues

- [5] The issues for the Authority to determine are the following.
- (a) Was the bonus a contractual term of Mr Anderson's employment agreement;
 - (b) If there was a contractual entitlement to a bonus, was Mr Anderson paid correctly for the 2007/2008 year with respect to his bonus;
 - (c) Has Mr Anderson waived his right to continue to claim there is money owing to him for the 2007/2008 year;
 - (d) If Mr Anderson is contractually entitled to a bonus and he has not waived that entitlement for the 2007/2008 year, is the Authority entitled to make an award to him or would that be fixing a new term and condition of employment;
 - (e) In relation to the final payment for the 2009/2010 bonus, if there is a contractual entitlement to a bonus, is Mr Anderson entitled to a pro rata payment of his bonus notwithstanding that he did not work a full year or would that be fixing a new term and condition of employment?

Was the bonus a contractual term of Mr Anderson's employment agreement?

[6] Mr Anderson commenced with Clough in October 2004 as a technical support person. His terms and conditions of employment were contained in a letter dated 3 September 2004 which was signed by Dougal Lamont the then Marketing Manager on behalf of Clough and Mr Anderson. The letter was described as the initial contract agreement until Mr Anderson's start dated when a full contract would be provided. A full contract was not provided. There was reference in the letter to a bonus payment under the heading *Remuneration*.

[7] The bonus provision provided:

2. ***Bonus Payment:-*** *You would participate in the company annual bonus which is based on the turnover of the company – This year if the budget is achieved a payment of \$2,200 will be paid. There will be a \$5,000 discretionary amount that will be based on overall general performance. The bonus schemes are reviewed annually for all employees.*

[8] In 2006 there was a restructuring and Mr Anderson's role was extended to cover South Island sales management and technical support. His new title was South Island area manager. In that role he reported to Bryan Jarvie the New Zealand sales manager. Mr Anderson looked after the area manager sales from Timaru to Invercargill and still retained a role providing technical support and Mr Jarvie looked after sales north of Timaru.

[9] Craig McIsaac is the managing director of the respondent. Mr McIsaac in his evidence said that from 2006 when Mr Anderson became the South Island area manager he became eligible for the sales based bonus scheme. There were two parts to the scheme. There was a discretionary bonus based on personal performance and a sales bonus based on turnover of sales.

[10] The bonuses for the years 2006/2007 and 2007/2008 paid to Mr Anderson were assessed on up to a \$5,000 discretionary bonus and the sales bonus on 0.1% of sales turnover plus 1% increase over the previous year plus a 1.5% increase over the set budget.

[11] On 16 December 2008 Mr Anderson in a letter from Mr McIsaac was advised that the Directors had made some changes to the calculation of the sales incentive bonus scheme from 2008/2009 onwards. The scheme was described in the letter as *intended to be an incentive for you and provide the “cream” on top of ... [an] already competitive base salary*. Mr Anderson was advised in respect to the sales incentive bonus scheme that there would no longer be a discretionary element to the bonus scheme, instead this would be capitalised back into Mr Anderson’s salary at 75% of the maximum value of this bonus. The other change was that the year’s sales would no longer be measured against budget as well as previous years’ sales but will now be recognised at 1.75% on the increase in the previous year’s sales. The 0.1% on total sales achieved for the territory remained as part of the bonus scheme. It was noted in the letter from Mr McIsaac that the bonus scheme entitlement from the past year would be calculated and paid out by the end of September each year and that the mechanics of the bonus was always open to review by management and the Board.

[12] That there would be such a change to the bonus scheme had been foreshadowed in a letter dated 19 September 2008 from Mr McIsaac to Mr Anderson advising him of his 2007/2008 bonus and salary level in which it stated; *The existing bonus schemes for all key staff are being totally reviewed for 2008/2009. The reason for doing this review is because the current schemes over the past years have created imbalances in the remuneration of key staff, which is not equitable or fair.*

[13] Ms Penno’s primary submission is that the bonus from 2006 was never a term of Mr Anderson’s employment agreement but a discretionary scheme containing the elements of a discretionary bonus based on personal performance and a sales bonus based on turnover of sales. In support of the discretionary nature of the bonus Ms Penno relies on the evidence from Robert Naylor, the business support manager, that the Board sets down the formula/criteria of payment for bonuses from time to time and that the scheme was reviewed and changed without consultation or agreement in 2008. Further she submits that the method of calculation of the bonus was itself the subject of variation relying on an agreement to increase the applicant’s portion of the bonus from 66% to 75% for the 2007/2008 year.

[14] Ms Penno relied on an Authority determination *Bronwyn Bradshaw v James Pascoe Limited* ERA AA 226/07 in which it was found that the bonus paid to Ms Bradshaw was not a contractual obligation but a discretionary scheme and that the

employer in that case was entitled to exercise its discretion not to pay the bonus as Ms Bradshaw left the company before the end of the financial year.

[15] Mr Clarke submits that the bonus was not a discretionary scheme, but was a contractual entitlement and although the discretionary part of the bonus was changed in 2008 the sales bonus remained similar to that in previous years based on sales turnover. Mr Clarke submits that in 2008 there was a variation of the discretionary component of the bonus and to a more limited extent the sale component of the bonus in Mr Anderson's employment agreement and Mr Anderson agreed to that variation.

[16] If the Authority was to find the bonus was not part of the employment agreement then Mr Clarke relied on the Court of Appeal judgment in *Tranz Rail Ltd v. Rail & Maritime Transport Union Inc* [1999] 1 ERNZ 460. This was a case of alleged discrimination because of different bonus payment made to groups of employees engaging or not in strike action. The Court was considering in that case s 28 of the Employment Contracts Act 1991 that dealt with discrimination and the words *terms of employment, conditions of work* and *fringe benefits*. It stated the following about terms of employment at para 26; *Broadly speaking, terms of employment are all the rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of an employment contract.* The Court of Appeal concluded in *Tranz Rail* that although the bonus scheme was expressed not to be part of the employment contract and to be able to be withdrawn and modified by the company as it saw fit it was part of the terms of employment of the employees in question and payments made under the plan were under s 28, fringe benefits.

[17] I find that Mr Anderson had an express contractual entitlement to a bonus in the letter containing his terms of employment. The discretionary part of the bonus remained unchanged until 2008/2009 but the turnover incentive part of the bonus was measured on sales from 2006 rather than company turnover. Payment of a bonus remained an express term of Mr Anderson's employment agreement. There was no other agreement entered into after 2006 to support that participation in a company annual bonus scheme was no longer an express term of his employment agreement. That there would be reviews of the *bonus schemes* of Clough was an express term of Mr Anderson's employment that he agreed to when he signed his letter containing his terms and condition of employment.

[18] A review did take place as described in the letter dated 19 September 2008 to Mr Anderson for the 2008/2009 year and beyond, that resulted in the capitalisation of the discretionary component of the bonus scheme into Mr Anderson's salary. There was limited change to the sales turnover bonus following the review. That aspect of the bonus was not discretionary although the bonus schemes were expressly subject to review. Mr Anderson had agreed to that.

[19] I find *Bradshaw* is distinguishable. Ms Bradshaw's employment agreement was silent on the subject of payment of bonuses. Mr Anderson's employment agreement was not silent about the bonus scheme. The bonus scheme in *Bradshaw* referred to a right to amend the bonus scheme from time to time as well as all bonuses being paid out at the discretion of the managing director. That was not the situation with the bonus scheme at Clough. One part of the scheme was discretionary but the other part was based on measurable sales turnover that if achieved at a particular level entitled the employee to a bonus.

[20] In conclusion the bonus was an express term of Mr Anderson's employment agreement.

Was Mr Anderson paid correctly for the 2007/2008 year with his respect to his bonus?

[21] Mr Anderson was advised by letter dated 19 September 2008 from Mr McIsaac that his bonus for 2007/2008 was \$28,337 for the sales scheme. The discretionary bonus was \$3,675 and Mr Anderson takes no issue with payment with that part of the bonus scheme.

[22] Mr Anderson did not believe that he had been paid what he was owed for the sales incentive part of his bonus for that year. The financial year at Clough runs from 1 July to 30 June. There was no dispute as to total bonus available based on actual sales turnover for the South Island. It was \$42,505. The sole issue for this period is whether the total available bonus of \$42,505 should have been split between Mr Anderson and Mr Jarvie in the way that it was. I shall set out the evidence about that.

[23] The nub of Mr Anderson's complaint is that he had to split the total sales bonus with Mr Jarvie in a way that did not reflect he had made most of the sales. In his evidence he said that he had sales responsibility for the whole of the South Island

from early 2007 and Mr Jarvie had managerial responsibility. Mr Anderson says because of that he should have received around 95/96% of the actual sales turnover of \$42,505 by way of bonus and Mr Jarvie around 4.8%. The bonus payment was initially made to Mr Anderson on the basis of a 66% split to him and 33% split to Mr Jarvie as it had been the year prior. I shall come to a subsequent payment made to Mr Anderson shortly.

[24] In January 2007 Mr Anderson's sales role as area manager was extended to cover North Canterbury to Invercargill which included approximately 95% of South Island sales for Duncan Agriculture, a division of Clough Agriculture. The evidence supports that this extension to sales territory in all likelihood arose because Mr Jarvie had been promoted in 2006 from the South Island area manager role to the New Zealand sales manager role with wider managerial responsibility.

[25] Mr Jarvie did not dispute that the majority of sales were in Mr Anderson's territory and neither did he really dispute that his sales could have been about 4.8%. Mr Jarvie had three or four main dealers in his territory. Mr Anderson calculated Mr Jarvie's split on the basis of sales generated from dealers in Mr Jarvie's territory. Mr Jarvie did not accept though that his share of the bonus should be less than 25% because he said sales were generated both ways and that such a split was fair and equitable. For completeness the evidence did not satisfy me that Mr Jarvie and Mr Anderson had agreed before the 2007/2008 bonus was paid what the sales turnover bonus split should be after the change in territory.

[26] Mr Anderson raised the issue with Mr McIsaac on 10 October 2008 by email that he had not been paid the correct amount for his sales bonus and attached spreadsheets with actual sales for the South Island to support his position that he did most of the sales. When he did not hear from Mr McIsaac he sent a follow up email on 5 November 2008.

[27] The next contact about the bonus was that Mr Jarvie went to see Mr Anderson on 2 December 2008. Mr Jarvie said in his evidence that he had discussed the bonus issue with Mr McIsaac and he recalled it was Mr McIsaac who proposed a 75/25 split. Mr McIsaac in his evidence said that there was an expectation that Mr Jarvie would pay some of his bonus to Mr Anderson and any costs to Clough would in that way be neutral. Essentially I find that he left it to Mr Jarvie and Mr Anderson to sort the

bonus issue out although he may well have suggested to Mr Jarvie a 75/25 split would be fair.

[28] There is a dispute as to whether Mr Jarvie informed Mr Anderson about the basis for the additional payment. Mr Jarvie said in his evidence that there must have been a discussion and felt sure that he presented the calculations to Mr Anderson and there was agreement. Mr Anderson said that there was no discussion as to how the sum was calculated and he does not accept that he reached any agreement with Mr Jarvie. Mr Anderson said that he remembered Mr Jarvie telling him that he had to pay \$3542 back to the company. Mr Jarvie did not accept he made that statement. In fact what happened was that the company simply deducted the amount it paid to Mr Anderson from other money owing to Mr Jarvie. I accept that Mr Anderson felt that Mr Jarvie was unhappy about having to pay something. Mr Anderson was paid the sum of \$3542 gross by Clough in the pay period ending 31 December 2008. It is shown on his payslip as *Extra Sales Bonus due* and beside it is the sum \$3542.00. Tax was paid on that amount.

[29] As to whether agreement was reached there is some support from two email exchanges from Mr Anderson to Mr McIsaac that he did not understand the basis for the payment in 2007/2008. The first is an email dated 23 September 2009 to Mr McIsaac questioning his bonus for 2008/2009. In that email Mr Anderson also stated about the previous year's bonus:

As you will recall last year I questioned this payment as approx 95% of the turnover was from my Dealers yet I only received 66% of the bonus. A dollar difference of \$12,043. Then Bryan came back and offered me a further \$3,542. At the end I was still out of pocket by \$8,501.

[30] In a second email to Mr McIsaac sent on 21 June 2010 Mr Anderson asks the following questions about the 2007/2008 bonus:

Why was my turnover sales bonus not paid as per it states, based on turnover/area? – Once questioned by me this bonus was reviewed and acknowledged by Duncan Ag and a further \$3,542 was paid. Where did this figure of \$3,542 come from and why was the full amount of \$12,043 not paid?

[31] Mr McIsaac had understood that the payment to be made by Mr Jarvie was after tax but that was not in fact the case –email from Mr McIsaac to Mr Anderson dated 23 October 2009. A net payment would have resulted in a different percentage

split than 75/25. I am not satisfied from the evidence that Mr Anderson understood that Mr Jarvie was offering payment of \$3542 as a 75% split and/or that it would be in full and final settlement of what Mr Anderson maintained he was entitled to. There was not a meeting of minds that the offer was in full and final settlement of the bonus. The payment itself was not made until some weeks later and through the company pay roll system, not directly from Mr Jarvie. I am not satisfied that there was an agreement that the payment made to Mr Anderson of \$3542 was in full and final settlement.

[32] The sales incentive part of the bonus had traditionally been paid on a territory division without complaint from Mr Anderson until 2007. This clearly required some adjustment following the extension to Mr Anderson's territory in 2007 and increase therefore in his sales which the bonus was paid to recognise. The evidence before the Authority was that Mr Anderson made most of the sales for the South Island from 2007. The portion of the bonus he was paid for 2007/2008 did not reflect the sales he had made.

[33] For the following 2008/2009 year Mr Anderson again raised a concern about his bonus split. Mr McIsaac agreed to pay it on the basis of a 95% split to Mr Anderson. Mr McIsaac said in evidence that he did this because Mr Jarvie had left by then and had not been paid a bonus and that in good faith he accepted Mr Anderson's assertions that he had taken over responsibility for almost all of Mr Jarvie's dealer clients. I am not satisfied that the situation that year was different in terms of the responsibility for dealers and sales than it had been for the previous year. I accept the difficulty for Clough in 2007/2008 was that it had already paid Mr Jarvie what it saw as his share of the bonus and it did not have that same problem in 2008/2009 as Mr Jarvie resigned. I find that Mr McIsaac did want to be fair in terms of Mr Anderson's bonus for 2007/08 but wanted to avoid the company paying more than what had already been paid to Mr Jarvie and Mr Anderson. It was however unfair to leave Mr Jarvie and Mr Anderson to try work it out and that really led to the matter remaining unresolved.

[34] The sales figures indicate it more likely than not that Mr Anderson was responsible for about 95% of the sales. Mr McIsaac put nothing in writing or said anything to Mr Anderson in 2008 after he was supplied with the sales figures for the South Island for 2007/08 that that was not correct position. I do not find on the

balance of probabilities that the position in 2007/2008 with respect to sales was different to the 2008/2009 year for which Mr Anderson's position was accepted and he was paid 95% of the South Island sales bonus. The only difference seemed to be that Mr Jarvie for that year had already received payment and as stated in Mr McIsaac's email of 23 October 2009 to Mr Anderson - *As far as the 2007/08 year goes the amount paid to you by Bryan Jarvie was after tax, and we cannot go back and make any further adjustments on these figures. I trust that we can now move forward and keep this scheme as uncomplicated and as incentivised a possible.*

[35] I do not find that Mr Anderson was paid correctly for his 2007/2008 sales bonus scheme. There is actually an error in Mr Anderson's calculation in para. 24 of his statement of evidence because 95% not 96% of \$42,505 is \$40,379.75. Mr Anderson has rounded that up to \$40,380. Mr Anderson has been paid \$31,879. The balance he is claiming is \$8,501 or, if there is no rounding up \$8500.75.

[36] I find that Mr Anderson should have been paid on the same basis as he was in the following year – a 95/5% split. He received an additional payment of \$3542 but is still owed \$8500.75 gross.

Has Mr Anderson waived his right to continue to claim there is money owing to him for the 2007/20078 year?

[37] Ms Penno was given a further opportunity to provide submissions on waiver after Mr Anderson provided some further documentation about some emails sent. The basis for the waiver submission is the evidence of Mr McIsaac that *out of the blue* he received an email from Mr Anderson whilst he was away in Australia that was the same as the one Mr Anderson had sent to him on 5 November 2008 asking how he was getting on with the 2007/2008 bonus issue. He said that he was annoyed to receive this and when he returned to Timaru he questioned Mr Anderson and told him he thought it had been *resolved and put to bed*. He said that Mr Anderson advised him the email was sent by mistake and it was no longer an issue.

[38] Mr Anderson in his written evidence in reply said on 6 April 2010 he had sent Mr McIsaac the same email he had sent on 5 November 2008. He said that Mr McIsaac telephoned him from South Africa and said he would talk to Mr Anderson on his return but that shortly after that Mr Anderson handed in his resignation and the matter was not discussed further.

[39] Ms Penno submits that Mr Anderson not revealing the existence of the 6 April 2010 email in his further brief until after the investigation meeting reveals his intention that he never meant to send the email to Mr McIsaac or his earlier evidence was misleading. She submits that the Authority cannot allow Mr Anderson in equity and good conscience to proceed with his claim and/or that he has waived his right to it.

[40] Mr Clarke submits that Mr Anderson's evidence is more reliable and should be preferred over Mr McIsaac's because Mr McIsaac did not recall what country he was in when he spoke to Mr Anderson about the email or the date of the email.

[41] If I thought that Mr Anderson had agreed that matters were settled when he discussed a payment with Mr Jarvie about his 2007/08 bonus then obviously he would not be entitled to proceed with his claim. I have not found that. Mr Anderson again raised the issue of the 2007/08 bonus in September 2009 and then again on 21 June 2010 after he resigned. An objective assessment of the evidence does not satisfy me it is likely that Mr Anderson accepted that the matter about his 2007/08 bonus had been resolved or told Mr McIsaac that it was, so as to conclude that Mr Anderson has waived his right to proceed with his claim for payment of the sales incentive bonus component.

Is the Authority entitled to make an award to Mr Anderson for the 2007/2008 sales bonus or would that be fixing a new term and condition of employment?

[42] I accept Ms Penno's submissions that the Authority cannot determine issues that would create legally a new term and condition of employment. In this case I have found that Mr Anderson had a contractual entitlement to a sales bonus. There is no dispute as to the amount of total sales turnover bonus available for the 07/08 year. The only issue for the Authority to determine is what percentage of that bonus Mr Anderson is entitled to. I do not find that by taking the evidence into account including the sales figures and the sales bonus payment to Mr Anderson for the following year the Authority is fixing a new term and condition of employment in determining what is owed.

[43] I find that Mr Anderson is owed for his 2007/2008 bonus the sum of \$8500.75 gross being 95% of the total sales turnover for the South Island of \$42,505 and I so order.

Is Mr Anderson entitled to a pro rata payment of his bonus for the 2009/2010 year notwithstanding that he did not work a full year or would that be fixing a new term and condition of employment?

[44] I have found that Mr Anderson had a contractual entitlement to participate in a company bonus scheme. He resigned from his employment approximately two weeks before the end of the financial year and Clough say that this means he is not entitled to a pro rata payment of his sales bonus for that year.

[45] I accept that previously employees of the company who resign before the end of the year have not been paid a bonus. I do not know what their circumstances were. Mr Anderson has a contractual entitlement to a bonus. There is no provision in his employment agreement that he would not receive a bonus unless he was employed at the end of the financial year. Equally there is no provision that he would be paid a bonus even if he did not work a full year on a pro rated basis. Ultimately however this question can be answered in Mr Anderson's favour because he is contractually entitled to a bonus. He achieved sales at a level that entitled him at the time he resigned to a bonus of \$3,650. The Authority is not, in making an award, fixing a new term and condition of employment.

Determination

[46] I have found that Mr Anderson is entitled to be paid the sum of \$8500.75 for a bonus for the year 2007/2008 and for the year 2009/2010 he is entitled to be paid a bonus in the sum of \$3,650.

[47] I order Clough Agriculture Limited to pay to Richard Anderson the sum of \$12150.75 gross for his unpaid bonuses.

[48] There is a claim for interest on the sums awarded. The Authority has power to award interest on any monetary sum awarded under clause 11 of the second schedule of the Employment Relations Act 2000. I find interest should be awarded on the combined bonus awards of \$12150.75 from the date the statement of problem was lodged with the Authority on 1 December 2010 to the date of payment at the rate of 5% under s 87(3) of the Judicature Act 1908.

[49] I am not minded to award a penalty. There were several legal issues that required resolution rather than a wilful breach not to pay.

[50] I reserve the issue of costs and would encourage the parties to reach agreement. If agreement cannot be reached then Mr Clarke has until 28 September 2012 to lodge and serve submission as to costs and Ms Penno has until 19 October 2012 to lodge and serve submission in reply.

Helen Doyle
Member of the Employment Relations Authority